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IN THE

Supreme Court of the United States.

October Term 1970

No. 400

RICHARD D. ZELECHOWER, M.D.; THEODORE A. COHEN; SUSAN COHEN; PETER D. BOGART and JUNE BOGART,
Petitioners,

vs.

EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; THOMAS C. LYNCH individually and as Attorney General of the State of California; RONALD REAGAN individually and as Governor of the State of California; the five members constituting the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; the judges of the SUPERIOR COURT OF THE STATE OF CALIFORNIA individually and as grand jury commissioners; THE PEOPLE OF THE STATE OF CALIFORNIA by Ronald Reagan, Governor of the State of California,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the modified opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The modified opinion of the Court of Appeals, and the special concurring opinion of Koelsch, C. J., not yet reported, filed February 27, 1970, appear as Appendix "A" below. The District Court failed to make any findings of fact or conclusions of law, in denying a preliminary injunction, as required by FRCP 52 (a), and its unreported, "Order dismissing action" is annexed as Appendix "B".

JURISDICTION

The opinion of the Court of Appeals was entered January 28, 1970, and modified, with a separate concurring opinion, on February 27, 1970. Timely petition for rehearing or rehearing en banc was denied April 17, 1970, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 USC 1254 (1).

Federal jurisdiction vests by virtue of the Declaratory Judgments Act, 28 USCA 2201 et seq., the "federal question" jurisdiction of 28 USCA 1331 and 1343, and the Civil Rights Acts, 42 USCA 1981, 1983 and 2000B et seq. The federal questions are premised upon discriminatory statutory procedures in the selection of grand juries (and juries). California law prohibits challenges to the panel of grand jurors (Penal Code §910), and there is thus no practicable alternative except the declaratory and injunctive relief sought here to enforce the Sixth Amendment's right to an "impar-

tial" jury, and the XIVth Amendment rights to Equal Protection, Due Process of Law and the Privileges and Immunities of citizenship, to-wit selection of grand juries from a cross-section of the community, and indictment or trial before such unbiased, impartial fori.

QUESTIONS PRESENTED

1. Whether a constitutional challenge to state laws, custom and usage, relating to grand jury selection procedures, presents a substantial federal question, where petitioners prove that the statutory impaneling procedure (a) frustrates any possibility of selecting impartial jurors from a cross-section of the community; (b) results in severe racial, ethnic and economic imbalance in the composition of grand juries; (c) excludes most or all members of the class of petitioners, where such "class" is measured by criteria of ethnic origin, place of birth, age, economic status, residence, profession, employment status, or marital status.

2. Whether measurable discriminatory selection procedures for state grand juries, under compulsion of state law and usage, are redressable in a federal civil rights action on the complaint of aggrieved persons? If so, whether the court must hold an evidentiary hearing and decide the constitutionality of state statutes and procedure in a declaratory relief action, and whether injunctive relief may lie to prevent reconvening of unconstitutionally selected grand juries, and giving force or effect to indictments returned by them?

3. Whether a state governor, attorney-general, district attorney, county supervisor, or a judge, who merely performs ministerial duties of a jury commissioner, may be held "immune from suit" in federal courts, where the complaint prays for declaratory and injunctive relief to determine the constitutionality of the state's jury selection statutes and procedures? . .

4. Whether the forum state's abrogation of common-law notions of "sovereign immunity", by developing statutory and decisional law, compels federal courts sitting in said state to regard such new law "as rules of decisions in civil actions" within 28 USCA 1652 and *Erie v. Tompkins,* and to deviate from precedents in federal courts which were based upon former state law or upon common law?

5. Whether a district judge's failure to make findings of fact and conclusions of law denying a preliminary injunction, as is required by rule 52a, F.R.C.P., requires summary reversal and remand for findings based upon the record?

6. Whether the First Amendment's right to petition the Government for a redress of grievances encompasses Civil Rights actions in federal courts, and the right to a hearing before an impartial state jury or grand jury, and whether such right places a concomitant duty upon such Government agencies to hear and entertain such matters on their merit?

7. Whether the holding of *Rawlins v Georgia,* 201 US 638 has fallen into desuetude and been impliedly overruled, ("The not uncommon misconception . . .

that the requirement of due process of law took up the . . . state . . . laws into the 14th Amendment so that this court would revise the decision of the state court that the local provisions had been complied with") where a long line of supervening decisions made the VIth Amendment's requirement of an "impartial jury" applicable to the states through the Due Process and Equal Protection clauses of the XIVth Amendment, and where supervening decisions have established an affirmative requirement of federal constitutional law that jurors be selected from a cross-section of the community? In the alternative, whether the holding of *Rawlins* limits standing to challenge discriminatory juror selection procedures to plaintiffs who "belonged to the excluded classes" and is thus distinguishable from this case?

8. Whether a District court may summarily dismiss a civil rights complaint, without leave to amend, on a theory of "official immunity", where it is and can be shown that state agents acted in direct contravention of their official duties to injure plaintiffs, and where state agents abused their official status, and defied the Constitution, state and federal laws and explicit orders of a court to damage plaintiffs? Especially so where state law has abolished former decisions based on governmental immunity?

CALIFORNIA STATUTORY PROVISIONS INVOLVED

Penal Code §897 [*Grand Jurors*]

"The selection and listings shall be made of persons suitable and competent to serve as jurors, and in making such selection there shall be taken only the names of persons who are not exempt from serving, who are in possession of their natural factulties, who are not infirm or decrepit, who are of fair character and approved integrity, and who are of sound judgment."

Code of Civil Procedure §200 [Exemptions from Jury Service]

"A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, naval or military officer of the United States or of this state, or a member of the armed forces of the United States while on active duty;

2. A person holding a county, city and county, city, town or township office of profit;

3. An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;

4. A minister of the gospel, or priest of any denomination following his profession;

5. A teacher in a university, college, academy, or school;

6. A practicing physician, or practicing licensed dentist, practicing podiatrist, or practicing registered optometrist, or druggist actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the state prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this state;

10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company, doing a general telegraph or telephone business in this state, or keeper of a public ferry or tollgate;

11. An active member of the National Guard of California, or an active Member of a paid fire department of any city and county, city, town or village in this state, or any exempt member of a duly authorized fire company;

12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad;

13. A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror in any such court, who has been discharged as a juror within a year as hereinafter provided; or a person who is incompetent under subdivision 3 of the preceding section; provided, however, that in counties having less than 5,000 population the exemption provided by this subdivision shall not apply;

14. A practitioner who treats the sick by prayer in the practice of the religion of any well-

recognized church or denomination, or a reader whose duty is to conduct regular religious services of such church or denomination; or

15. A member of a religious order which is part of any well-recognized church or denomination who devotes his life to a cloistered contemplative existence."

Los Angeles Superior Court Rule 29 [GRAND JURY] *Section 2 Nominations by Judges, Each November*]

"(a) On or before the first Monday of November of each year, each judge of this court may nominate and transmit to the presiding judge the names of two persons to be placed upon a list, from which the court shall select the persons from among whom the grand jury for the ensuing year shall be drawn. The persons so nominated shall be persons qualified for such selection under the provisions of Part 1 . . . of the Code of Civil Procedure. The nominations shall be made in writing and shall state the name, approximate age, residence address, and occupation of such person so nominated."

(b) Spouses of judges and commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice, shall not be nominated for Grand Jury Service." ***(as amended 1963)

Note: The foregoing statutes have been changed by minor amendments since inception of the action, which are not material to the issues raised herein.

I

STATEMENT OF THE CASE

1. Introductory.

Complaint under Civil Rights Act and Declaratory Judgments Act by persons of "ethnic minority" status including a physician, practicing attorneys, spouses and secretaries of attorneys. Plaintiffs allege systematic exclusion of all persons of their class from grand juries of the state and county, and substantial exclusion of persons of their class from petty juries, and violation of plaintiffs' constitutional right to indictment and trial by impartial jurors selected from a cross-section of the community.

The complaint sought specific equitable, declaratory and legal relief, which may be summarized as (1) a declaration that the procedures established by state statute and custom for selection of jurors are repugnant to the Constitution on their face and as applied to plaintiffs; (2) interlocutory and permanent injunctions forbidding implementation of the state's statutory grand jury and jury selection procedures, and requiring selection of jurors from a fair cross-section of the community, and quashing two indictments rendered by such unconstitutionally prejudiced jurors; and (3) nominal damages.

2. The Challenged Juror Selection Procedures.

California statutory and customary procedures for selection of grand jurors (and, to a lesser extent, of petit jurors) result in virtual exclusion and substantial underrepresentation of ethnic minorities such as Negroes, Spanish-Americans and persons of national origin other than Anglo-Saxon.[1] There is also significant economic discrimination against employed persons and employed women, against professional people, and against other large classes of the community.[2] The combination of excluding more than 99% of the constitutionally eligible persons in Los Angeles County from ever being considered for grand jury service, and inclusion of not more than 10,000 hand-picked, mostly unemployed candidates—out of more than 4 million persons who meet the constitutional test of eligibility—results in depriving plaintiffs and their peers of their Vth and VIth Amend-

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[1]The U.S. Commission on Civil Rights published its report *Mexican Americans and the Administration of Justice in the Southwest* (hereafter 'CRC report') in March 1970. Although the report speaks of "Mexican-Americans", it deals with a broader category of "Spanish-surname" persons, who include persons of Hispanic national origin from many countries. The report's conclusions on juror discrimination:

> "Our investigations reveal that Mexican-American citizen . . . are substantially underrepresented on grand and petit juries and excluded from full participation in law enforcement agencies***" (page iii)

On page 112-135, the CRC report publishes a scientific statistical study on underrepresentation and exclusion of Spanish-surname persons from California grand juries. Los Angeles county grand juries show an underrepresentation of 80.2% of Spanish-surname citizens as against the remainder of the county's population. *A Study of Grand Jury Service by Persons of Spanish Surnames and Indians in Selected California Counties*, CRC report p. 112, 127.

See also *Zelechower v. Younger*, DC CD CAL #67-1459-FW and the affidavit of J. J. Daniels filed December 4, 1967 in said case.

[2]Zelechower v. Younger, DC CD CAL #67-1459-FW, complaint p. 8-9, Second Claim. Daniels, *Our Grand Juries Must be Unfettered*, Los Angeles Herald Dispatch 9/15/66 p. 3, Affidavit of J. J. Daniels, supra, footnote 1.

ment constitutional rights to "impartial" juries, which rights have been made applicable to the several states by the XIVth Amendment. The unconstitutional jury selection procedures further deprive the public of impartial and unbiased grand jurors who are willing to carry out their "watchdog" functions[3] to serve as "checks and balances" against governmental encroachment, as county grand juries are required to do by state law.[3]

California statutes which govern juror and grand jury selection require jurors to be citizens, residents for more than a year, English-speaking, "in possession of their natural faculties," "not infirm or decrepit" and not convicted of major crimes. We do not challenge these general restrictions.

Sections 903.1 and 903.3 of the Penal Code require Superior Court judges to adopt "rules and instructions" for grand jury selection; the judges place on the grand jury list "such persons as, in their opinion, should be selected for grand jury duty." Superior Court Rule 29 permits each judge to nominate not more than two candidates annually. No person can

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[3]Penal Code § 914.1, 925 - -935.5 (investigation of county, district and housing authority affairs, books and records); § 919 I (investigation of public prisons, unindicted prisoners and corruption of public officers); § 920 (investigate realty subject to escheat).

[4]Penal Code § 888 et. seq.; Los Angeles Superior Court Rule 29; Code of Civil Procedure § 200 (Classes exempt from service on grand juries and petit juries). Those included in the classes enumerated in C. C. P. § 200 must claim their statutory exemption from service on petit juries, but they are precluded from ever serving on grand jury by a mandatory exclusion of Penal Code § 897. The text of the challenged statues is reprinted under the heading *California Statutory Provisions Involved*, supra.

be nominated, unless he is personally known to a superior court judge, who must personally warrant that the candidate is of "approved integrity," of "sound judgment" and of "fair character" (Penal Code §897). Such ambiguous guidelines appear to be void for vagueness.

A survey published in 8 *Stanford Law Review* 631 at 654 reveals that most California judges, including judges of Los Angeles county, had determined that the "Public Interest is best served (by) 'Above Average Citizens' on grand juries, as opposed to juries composed of a Cross-Section of the Community'." These jury selectors have admittedly adopted an oligarchic, unconstitutional standard. They admittedly oppose selection of constitutionally ordained "impartial" jurors, who are democratically selected from a cross-section of the community, without discrimination against, or exclusion of any ascertainable class which represents the conscience of the community.

Los Angeles County has in excess of 4 million adult persons who meet the objective standards for jury service. By virtue of the statutes challenged herein, the number of candidates for grand juries is reduced below 10,000. An estimated 99¾% of the theoretically eligible adults in the County of Los Angeles are summarily deprived of their right or duty of citizenship. More than 50% of the theoretically

eligible adult persons in Los Angeles County are summarily deprived of the right or duty to serve as petit jurors.

No Superior Court judge could warrant in good conscience that he was personally well enough acquainted with more than 50-100 persons to vouch for their "approved integrity" or "sound judgment" when called upon to select his two candidates annually. The total number of candidates that can thus be considered by the jury selectors is less than 10,000. A further result of setting a standard of a judge's personal "approval" for grand jury nomination is virtual exclusion of ethnic minorities, Negroes, Spanish-Americans and foreign-born citizens. Ethnic minorities are conspicuous in their absence from the circle of personal acquaintances of our judges, and the number of "ethnic minority" judges is infinitesimal.[5]

A further result of the challenged system of using Superior judges as "key-men" jury selectors are over-age grand juries.[6] On representative grand juries the median age was 61, only four out of 23 jurors were under 50, and the *youngest* man on the 1966 grand jury was 48. The statistical age average is 26 for the county, and less than 42 for the voting-age population of 21 years and over.[6] The selection pro-

[5]Zelechower v. Younger, DC CD CAL #67-1459-FW, affidavit of J. J. Daniels, filed December 4, 1967; see also complaint in said case, p. 6, 8, 9. CRC report, p. 113-115.

[6]CRC report p. 114; Hearings of the California Assembly Interim Committee on Government Efficiency, Part III (10/31/1967) p. 57.

cedure favors greatly dwellers of high-class residential districts, top economic classes, the wealthy, the unemployed, the retired.[6] As one man commented in explaining how he was selected to be foreman of a grand jury: "Of course, I have lots of friends who are judges. I am a banker."[6]

The worst feature of the challenged statutory scheme is exclusion of most professional men and women and exclusion of of all persons whose education, business and occupation make it likely that they have acquired a broad, liberal and sensitive point of view. Virtually all persons who are prima facie suspect of fairness and impartiality are excluded from service as grand jurors (Penal Code §897; C.C.P. §200). Had the Legislature deliberately sought narrow-minded, parochial ultra-conservative jurors, afflicted with "tunnel-vision", and had it deliberately sought to choose "hanging jurors" who were guaranteed not to be "tainted" by the brush of social conscience and unaffected by the milk of human kindness and responsibility, it could not have improved on the exclusions of C.C.P. §200, *supra*.

The statutory scheme goes beyond any possible legitimate governmental purpose, and must be challenged for its unconstitutional "stacking" of juries with biased jurors. The statute prohibits grand jury nomination of any person connected with the legal profession — including clerks, secretaries, stenographers, and even spouses of lawyers and judges; it

excludes the entire medical profession, all clerics and religious workers, all teachers and educators, social workers, hospital employees, and all federal, state and local government employees; it even excludes persons engaged in communications industries and the National Guard, and all persons employed by charitable institutions—citizens who are more prone to come in contact with other persons and progressive ideas than the parochial dweller of a mental ghetto who is most amenable to prosecution enticement.

Those remaining in the running for jury service are in all likelihood the most submissive citizens, those most likely to accept with abject submission and without questioning the (uncontradicted) pronouncements of prosecution agents, those who are properly awed by being permitted to play their small part in the great governmental scheme, those most likely to follow the leader uncritically.

The plaintiffs in this action have standing to challenge the statute: each plaintiff belongs to one or more of the excluded professions. They are thereby deprived of the constitutional right to be indicted and tried by a jury "of their peers." Plaintiffs also belong to one or more classes or groups which were systematically excluded from, or substantially underrepresented on grand juries and petty juries, where such classes are measured by ethnic, economic, residential, marital, employment and similar criteria.

Two plaintiffs belong to a special socio-economic

class of "spouses of lawyers." They were indicted by grand juries from which all members of their peer-group had been deliberately excluded, as required by Superior Court Rule 29. We cannot conceive of any possible legitimate governmental purpose of such exclusion. Our view is shared by the separate opinion *below* of Koelsch, C.J. Nowhere in Anglo-Saxon jurisprudence did we find a statute which punishes a person with the loss of the civil right or duty of jury service for no better reason than that he or she married a lawyer.

Illustrative of the discriminatory use of unconstitutionally selected grand juries by unconscionable prosecutors are the cases of petitioners. Only an infinitesimal portion of felony charges in Los Angeles County —less than 1%—are prosecuted by secret indictment, while more than 99% of such charges proceed by the more progressive complaint/information route, which enables an accused to appear, defend, and plead technical and constitutional defenses that are generally unavailable to indictees until a much later stage of the proceedings. Yet a large percentage of the (few) indictments returned accuse lawyers, doctors and persons belonging to the excluded classes. The prosecutor's intent to "stack the deck" with prejudiced grand jurors, in preference to a fair magistrate, is obvious. Many grand jury indictments are replays of cases the prosecutor lost.

Petitioners Bogart were first acquitted by two

magistrates, after hearings on the merits, of most of the accusations made against them. In direct violation of the magistrate's order, the prosecutor refiled the same charges as an information. Upon submission on the merits, the court dismissed most of the information as devoid of a prima-facie case, and found a charge of "conspiracy" devoid of merit. Petitioners then moved for a trial setting on the remaining charge but the prosecutor refused to go to trial, and the court entered a final judgment of dismissal in the nature of an acquittal.

State statute requires grand juries to retain the district attorney as "legal advisor." Disguising his charges under new case numbers, the district attorney "advised" the grand jury—selected from citizens who are prejudiced against ethnic minorities and against the learned professions—to indict petitioners, to penalize petitioners with exaction of new bail, but to refuse petitioners an opportunity to present charges of official corruption. The subject matter of the "theft" charges was a statutory misdemeanor of abetting an assertedly improper unemployment insurance claim and non-completion of payments on furniture instalment contracts of minor value. These charges are certainly not sufficiently grave to warrant the special grand jury treatment, ordinarily reserved for the worst ¼th of 1% of the 80,000 felonies reportedly committed in the county during said year. A compliant judge sustained a few of such charges, on the 4th round, and the state court refuses to set a trial date on the

revived "conspiracy" charge, which is pending now and was pending during all proceedings below.

But for the unconstitutional discriminatory juror selection procedures, the prosecutor could not "advise" a prejudiced grand jury to charge petitioners with the same offenses a fourth time. California courts have frequently required "impartial" jury selection procedures . . . in theory. See, e.g. *People v. White* (1945) 43 Cal 2d 740, 749-54, 278 P2d 9; *People v. Carter* (1961) 15 C.R. 645, 364 P2d 477; *People v. Robinson* 38 C.R. 890, 392 P2d 970 (1964), rev'd on other grounds. The trial judges, acting as juror selectors, have consistently circumvented such dicta. In the state courts "no challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, except when made by the court for want of qualification"; (Penal Code §910). No effective state remedy exists. Jurors are not classified on official records by race or ethnic origin, which prevents successful challenges similar to those in Southern states, where racial breakdowns are made; the only remaining criteria is that of "Spanish-surname" jurors, and economic, employment, age and marital criteria mentioned *supra.*

This court has on more than one occasion found discrimination in juror selection in federal courts sitting in California. *Thiel v. Southern Pacific* (1946) 328 US 220 (economic discrimination); *Ballard v. United States* (1946) 329 US 187 (improper exclusion of females). Only the dissent argued unsuccessfully in

Thiel that the economic discrimination embodied in CCP §200, which is challenged in this case, should bind federal jury selectors in the forum state.

3. Proceedings in District Court and Court of Appeals.

Following the filing of their complaint for declartory and injunctive relief and nominal damages in the district court, plaintiffs prayed for an interlocutory injunction, upon a showing that their irreparable damages are not merely those commonly suffered by any person subjected to criminal prosecution, but that pursuant to state law (Calif. Bus. & Prof. Code § 6101-2) attorneys are summarily suspended without an opportunity to be heard, and not permitted to practice their profession until final determination of the case; only then may an attorney be heard as to whether or not he should be diciplined. Fees that a professional man is not permitted to earn are irremediably lost. Petitioners argued that the 4th-round prosecution, following 3 rounds terminated in favor of petitioners, all for one and the same asserted charge, was prima-facie unconstitutional, and prima-facie not in good faith.

The named state agents moved to dismiss the complaint, alleging a plethora of defenses; among the more serious arguments was that they were "immune" from civil rights actions, that petitioners merely wanted to "enjoin criminal proceedings", and that federal courts should abstain from supervising state prosecutions.

irregardless of whether such prosecution takes place in good faith or bad faith, at least until availibilty of federal habeas corpus upon incarceration of the accused.

Petitioners showed that the action would *not* prevent a bona-fide criminal prosecution; at worst these specific indictments would be quashed, but nothing would prevent prosecution by way of complaint/information, or before an impartially convened grand jury; that the state agents had no immunity from suit for the declaratory and injunctive relief, nor for damages (*Monroe v. Pape* 365 US 157); that abstention was inappropriate where important constitutional questions are involved, (*Dombrowski v. Pfister* 380 US 479) and dismissal inappropriate where defendants contest the facts. Petitioners proved by verified complaint and by an independent affidavit the fact of discriminatory jury selection procedures.

Following submission of the motions, the District Court did not convene a three-judge court; it did not make any findings of fact as required by F.R.C.P. 52, but summarily denied an interlocutory injunction. This denial was premised upon the frequently misquoted decision in *Douglas v. City of Jeanette* 319 US 157, which held a formal injunction unnecessary, where the statute [under which Douglas was convicted] had been declared unconstitutional in a companion case decided at the same time.

Thereafter, the District judge dismissed the action

by adopting virtually all of respondents' points including such factually incorrect and dehors-the-record assertions as "laches" and "statute of limitations", and the purported lack of the $10,000 jurisdictional amount, which had been held inapplicable to federal question actions by *Douglas v. Jeanette, supra* the very case upon which the honorable district judge relied so heavily. See Appendix "B".

Upon a timely appeal, a divided Court of Appeals affirmed (Appendix "A") on a modified opinion and a modified separate concurring opinion. The majority of the Court of Appeals did not rule upon the fundamental constitutional issue involved—whether systematic racial, ethnic and economic discrimination in juror selection constituted a denial of constitutional Due Process and Equal Protection within the Vth, VIth and XIVth Amendments. The issue whether such discrimination was repugnant to the Constitution per se, and as applied to petitioners, had been squarely presented, but both courts skirted the issue. The Court of Appeals premised its decision on the more limited exclusion of "certain professionals" and found "a recognized state interest of shielding certain . . . occupations from the interference that would result from jury service. On the merits, petitioners will show that the "shielded" occupations, as enumerated by the challenged statutes [*CCP* §200 and *Superior Court Rule* 29] constitute approximately 33% of the total labor force in the county, a higher percentage than

that held unconstitutionally excluded in *Thiel v. Southern Pacific*, 328 US 220. The Courts below, however, did consistently refuse to entertain the submitted allegations that more than 99% of the adult citizens of the county have been eliminated from consideration for grand juries by virtue of the restrictive selection process from "above average citizens", and that a majority of adult citizens are likewise excluded from petit juries.

As an alternative, the Court of Appeals sought to invest respondents with a "claimed immunity" unsupported by any authority whatsoever. Petitioners had shown the Court that state law had abrogated most governmental immunities, and that many of the "claimed immunities" had never been judicially recognized in the first place.

In a strongly-worded separate opinion, Koelsch, C.J. took issue with the unique exclusion of "spouses" of certain professions, and argued such discrimination presented a substantial federal question. However, the separate opinion would still deny injunctive and declaratory relief on principles of abstention, and set up a non-existing governmental immunity without citation of authority.

Fundamentally and factually, this case is on all fours with *Carter v. Jury Commission* (1970) 396 US 320 and *Turner v. Fouche* 396 US 346, decided after submission and before decision of the case at bench. The Court of Appeals denied rehearing as prayed upon the authority of *Carter* and *Turner*.

The constitutional attack on the juror selection procedures in *Carter, Turner,* and in our case are virtually identical. The Fifth Circuit, in direct conflict with the Ninth Circuit, found a substantial federal question in systematic discrimination in jury selection and convened three-judge District Courts pursuant to 28 U.S.C. §§ 2281 and 2284 in *Carter* and *Turner*. this Court has affirmed *Carter v. Jury Commission,* 396 US 320, and found the jury discrimination issue raised in *Turner* a federally cognizable "invidious discrimination".

Carter and *Turner* are dispositive of the case at bench. Both decisions expressly recognize the necessity and propriety of federal mandatory or prohibitory injunctions to halt discrimination in the selection of jurors. The Court of Appeals below placed heavy reliance upon a companion case to *Carter, Bokulich v. Jury Commission* 394 US 97 (1969) [per curiam] where this Court sustained a mandatory injunction, ordering "that juries be reconstituted on a non-discriminatory basis" and found it unnecessary to enjoin criminal proceedings before they had started before the new, impartial, jury. As distinguished from *Bokulich,* petitioners never asked to enjoin state criminal proceedings as such; they merely prayed to quash specific indictments rendered by prejudicially selected grand juries, leaving the state free to prosecute before an impartial magistrate, judge or jury.

The 'facts' in this case are largely propositions of law; we find fact and law inextricably intertwined, and have set both forth in our statement. The fact that more than 99% of the adult citizens of the county are systematically excluded from service as grand jurors is the necessary and inevitable result of the laws challenged herein. Petitioners—not respondents—should be entitled to summary judgment as a matter of law.

The judgment should be summarily reversed, and a decree fashioned along lines approved in *Carter* by a court convened pursuant to 28 U.S.C. 2281, 2284.

REASON FOR GRANTING THE WRIT

I

THE DECISION BELOW PRESENTS A DIRECT CONFLICT WITH RECENT APPLICABLE DECISIONS OF THE COURT ON THE FEDERAL QUESTION OF DECLARATORY AND INJUNCTIVE RELIEF TO SECURE SELECTION OF IMPARTIAL JURIES.

In a series of recent decisions, this Court has approved the principle that "a petition for injunction on the ground of the unconstitutionality of a *statute,* either on its face or as applied. . . requires a three-judge court", where the asserted unconstitutionality consists of discriminatory jury selection procedures, *Turner v. Fouche,* 396 US 346, f.n. 10. This Court did "reject the . . . contention. . . that the three-judge court was improperly convened because of the insubstantiality of the appellants' challenge to the (state) laws" relating to discriminatory grand jury selection procedures. *Turner v. Fouche,* 396 US 346, f.n. 10. "(T)he District Court properly entertained the question whether the constitutional and statutory complex, even if not invalid on its face, was unconstitutionally administered". *Turner v. Fouche,* supra, f.n. 10.

This Courts holding is in direct and irreconciliable conflict with the decision in our case, where the Court of Appeals held that a challenge to California's discriminatory jury selection statutes and procedures present no "substantial" federal question and does not require a three-judge court. However, the separate

opinion of Koelsch, C.J., does recognize that even the limited portion of the challenged statutes considered by the court below does represent a substantial federal question; it would, therefore, require a three-judge court.

Petitioners did submit for adjudication the *entire* challenged discriminatory jury selection procedure, resulting from statutes, court rules, custom and usage, in petitioners' second claim. The court below passed these issues sub silentio, but summarily dismissed such questions as not "substantially federal". This permits perpetuation of necessarily prejudiced juries, contrary to the constitutional requirement of "impartial" jurors, and causes a flood of federal and state appeals by thousands of prisoners convinced they 'never had a chance'.

The decision below is directly in conflict with a long line of holdings by this Court,[7] that systematic exclusion of any significant segment of the eligible population from grand and petit juries constitutes a substantial federal question, which must be passed upon by this Court under its "federal question" jurisdiction.[7]

The decision below also conflicts with *Carter v. Commission* 396 US 320. Following numerous decisions

[7]Strauder v. West Virigmia, 100 US 303 (1880); Bush v. Kentucky, 107 US 110; Carter v. Texas 177 US 442 (first grand jury case); Roger v. Alabama, 192 US 226; Martin v. Texas 200 US 316; Norris v. Alabama, 294 US 587 (1935); Hale v. Kentucky 303 US 613 (1938); Pierrev v. Louisiana, 306 US 354 (1939); Smith v. Texas, 311 US 128 (1940); Hill v. Texas, 316 US 400 (1942); Patton v. Mississippi, 332 US 463 (1947); Cassell v. Texas 339 US 282 (1950); Hernandez v. Texas 347 US 475 (1954) (Spanish-surname exclusion); Reece v. Georgia, 350 US 85 (1955); Eubanks v. Louisiana, 356 US 584 (1958); Arnold v. North Carolina 376 US 773 (1964); Whitus v. Georgia, 385 US 585 (1966); Sims v. Georgia, 398 US 404 (1967) are representative cases.

in lower federal courts, which declared discriminatory jury selection procedures repugnant to the Constitution and laws of the United Sates,[8] and fashioned injunctive decrees, ordering state jury selection procedures to conform to the constitutional standard, *Carter* was "the first case to reach the Court in which an attack upon alleged racial discrimination in choosing juries had been made by plaintiffs seeking affirmative relief, rather than by defendants challanging . . . convictions on the ground of systematic exclusion . . . from grand juries. . . . trial juries, or both. *The District Court found no barrier to such a suit, and neither do we.*" (Emphasis supplied).

This Court ordained in *Carter* that an attack upon alleged discrimination in selecting jurors presented a substantial federal question to be adjudicated by declaratory judgment and remedied by injunction issued by a federal court following an "extensive evidentiary hearing".

This Court's holding conflicts with the decision below, that refused any hearing on the merits, upon asserted insubstantiality of such federal questions, and preferred to abstain from declaring the rights of the parties, in direct conflict with *Zwickler v. Koota*, infra, 389 US 241.

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[8]See, e.g., Scott v. Walker, 358 F 2d 561 (5 Cir 1966); Davis v. Davis, 361 F2d 770 (5 Cir 1966); Brooks v. Beto, 366 F2d 1 (5 Cir 1966); US ex rel. Goldsby v. Harpole 249 F2d 417 (5 Cir 1957) and 263 F2d 71 (5 Cir 1959); Labat v. Bennett, 365 F2d 698; Brown v. Rutter, 139 F. Supp. 679 (W.D. Ky. 1956); Mitchell v. Johnson (M.D. Ala. 1966) 250 F. Supp. 117; White v. Crook (M.D. Ala. 1966) 251 F. Supp. 401 (exclusion of women unconstitutional); Henslee v. Stewart, 206 F. Supp. 137 (E.D. Ark. 1962), aff'd 311 F2d 691 (8 Cir 1963); In re Newton, (W.D. La. 1963) 224 F. Supp. 330, aff'd per curiam 343 F2d 161 (5 Cir 1965); Gordon v. Brezeale (N.D. Miss. 1965), 246 F. Supp. 2.

Carter and *Turner* were forordained by the per curiam decision in *Bokulich v. Jury Commission* (1969) 349 US 97, where the Court approved the remedy of a mandatory injunction, requiring immediate compilation of jury lists on a non-discriminatory basis. The opinion below erroneously cited the same case for the proposition that injunctive relief should be denied, in direct conflict with the holding of this Court. (Petitioners expressly concede that the state had the right to indict and try them, and all persons of their peer-group, before juries selected on a non-discriminatory basis, as set forth in the *Bokulich* opinion, after quashing indictments returned by the discriminatory selected grand juries).

There is no possible justification for the Ninth Circuit's refusal to be bound by *Carter, Turner* and *Bokulich*, which were brought to the court's attention. Certainly the fact that Negroes sued in *Carter* and *Turner* cannot be dispositive, where the complaint and affidavits in the District Court prove exclusion or underrepresentation of Negroes, and also of Mexican-Americans, foreign-born citizens, as well as economic discrimination in the selection of candidates for jury service.

This court has repeatedly held that exclusion or underrepresentation of *any* ascertainable class from jury service violates the constitutional requirement of a selection form a cross-section of the community. See, e.g. *Hernandez v. Texas* (1945) 347 US 475 (Spanish-Americans); *Thiel v. Southern Pacific* (1946) 328 US

220 (economic discrimination); *Ballard v. United States* (1946) 329 US 187 (women). But see *Hoyt v. Florida* 368 US 57.

State courts have applied the federal anti-discrimination criteria in the selection of jurors to other ascertainable classes. See, e.g. *Schowgurow v. Maryland,* 240 Md. 121, 213 A2d 475 (1965) (atheists and agnostics); *Robson v. Grand Truck R Co.* (1966) 5 Mich App. 90; 145 NW2d 846 (young people and employed persons); *Montoya v. People* (S. Ct. Colo. 1959) 345 P2d 1062 (Spanish surmanes); *Juarez v. Texas* (CCA Tex, 1952) 277 SW 1091 (catholics). Cf. *State v. Dodge* (1961) 12 Utah 2d 293, 365 P2d 798 (intelligence quiz to juror candidates held hermless error).

In the exercise of its supervisory power over the federal courts, and in view of the lower court's direct conflict with this Court, certiorari should be granted to bring about uniformity of decision.

II

THE COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH DECISIONS OF THIS COURT, REQUIRING HEARING THE MERITS OF CONSTITUTIONAL CHALLENGES TO STATE LAWS, RATHER THAN ABSTENTION AND SUMMARY DISMISSAL.

The judgment of the District Court and the separate opinion of Koelsch, C. J. are premsied upon the "abstention' doctrine, which this court condemned in a long line of cases culminating in *Zwickler v. Koota,* 389 US 241. The District judge interpreted *Douglas v. City of Jeanette* 319 US 157, (1943) as making it elective whether a federal court should "assume jurisdiction" or not. This was patent error and contrary to this court's interpretation of *Douglas,* where it was unnecessary to enjoin separately prosecution under a statute which had been invalidated in a companion case, and remanded at the same time. *Zwickler v. Koota* 398 US. 241. *Douglas* is limited to its specific facts and was never meant to abrogate the constitutional mandate that federal "judicial power shall extend to all cases arising under this Constitution . . . "*Constitution,* Art' III. § 2.

The Judicial Article of the Constitution mandates the exercise of federal question jurisdiction in "all" cases brought to the court. Nothing could be clearer than the word "all"—which certainly does not mean "some" cases, "selected" cases, "easy' cases, "cases" that are better left alone", or "important cases". As

early as 1821 did Chief Justice Marshall condemn 'abstention' as "treason to the Constitution". *Cohens v. Virginia* 6 Wheat 264, 404. A long line of decisions of this Court establishes "the duty of a federal court to decide the federal question when presented to it." *Zwickler v. Koota*, 389 US 241. "The judge-made doctrine of abstention, first fashioned in 1941 . . . sanctions such escape only in narrowly limited 'special circumstances'. *Zwickler, supra,* at 248.

Federal courts cannot plead "lack of jurisdiction" when they merely want to abstain. *Baker v. Carr*, 369 US 186, 189-203 and cases cited. Abstention is especially improper where civil rights are in litigation. *Zwickler v. Koota,* supra, *D'Amico v. California* 389 US 416.

This court has often reiterated that abstention is not permissible unless the underlying state law can be interpreted without necessarily determining the federal question. *Harman v. Forssenius* 380 US 528; but where no possible interpretation could save the state law, abstention is inappropriate. *McNeese v. Board of Education* 373 US 668. Abstention is especially inappropriate where there is evidence of bad faith in the enforcement of a questionable state law, *Dombrowski v. Pfister* 380 US 479, or where there are interminable delays in state proceedings to vindicate civil rights. *Griffin v. County School Board* 377 US 218. In the framework of our case, cf. the 1954 decision of the California Supreme Court in *People v. White* 43 C2d 740, 748-54, condemning discriminatory jury selection procedures.

with the 1963 and 1966 amendments to *Superior Court* Rule 29, which have the effect of excluding more than 99% of the eligible citizens, and prepetuate racial, ethnic and economic discrimination.

The Court below acted in conflict with the decisions of this Court, and fell into the same trap which this Court condemned in *Zwickler v. Koota* 389 US 241. In direct conflict with *Zwickler,* the District Court below felt denial of injunctive relief would justify abstention "from considering the request for declaratory relief. This conclusion was error. *Dombrowski (v. Pfister,* 380 US 479) teaches that the question of abstention and of injunctive relief are not the same . . . a request for declaratory judgment that a state statute is overbroad . . . must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that the federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusions as to the propriety of the issuance of an injunction." *Zwickler v. Koota* 389 US 241, 253-4.

The court below is in conflict with the admonition of *Dombrowski, Baker v. Carr, Powell v. McCormack* 395 US 486, *O'Callahan v. Parker* 395 US 258, and other decision of this Court, requiring District Courts to issue declaratory judgments upon constitutional challenges, irregardless of whether or not the court will issue an injunction against operation of the challenged law.

A long line of decisions of this Court, requires federal courts to act, rather than to abstain. Public policy and basic notions of a democartic society require adjudication of controversies by courts of law, not by riotous excess of the "law of the street". Those who have their "day in court" will not feel compelled to take to the streets. Far too many citizens have tired of technical dismissals, summary denials of relief, and "abstentions" by judges who commit "treason to the Constitution" with impunity. (Cf. *Cohens v. Virginia, supra.*

These direct conflicts justify the grant of certiorari to vacate the judgments below.

III

THERE IS A CONFLICT BETWEEN THE DECISION BELOW AND APPLICABLE DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER OF FEDERAL JURISDICTION TO COMPEL IMPARTIAL SELECTION OF STATE JURIORS.

Most of the cases which invoked the Equal Rights provisions of the XIVth Amendment and the Civil Rights Acts, 28 USC 1881 et seq., to compel indictment and trial by juries selected from a cross-section of the community, come from the Fifth Circuit. It is well established throughout the Fifth Circuit that the federal courts have federal-question jurisdiction of such challenges. State laws and customs which tend to deprive any citizen of a fair opportunity to participate in "impartial" juries can be challenged in

federal fori. See, e.g. *Seals v. Wyman,* 304 F 2d 53 (1962) and cases in footnote 8. Procedurally, the Court of Appeals usually convenes a three-judge court which hands down a declaratory judgment that state procedures resulted in discrimination in jury selection, often accompanied by an injunctive decree. See, e.g. *White v. Crook*, 251 F. Supp. 401; *Bokulich v. Jury Commission,* 298 F. Supp. 181 and cases collected in footnote 8.

The Eighth Circuit has taken the same view: See, e.g. *Bailey v. Henslee* (8 Cir. 1961) 287 F 2d 936; *Mitchell v. Henslee* (8 Cir 1964) 322 F 2d 16 (Hearing ordered on jury exclusion issue).

The Tenth Circuit has recognized the federal remedy is available: *Hoods v. Munns* (10 Cir 1965) 347 F 2d 948. The courts in the *Fourth Circuit* have also recognized the availability of the federal remedy. See, e.g. *Harris v. North Carolina* (ED NC 1965) 240 F. Supp. 985; *Williams v. State* (ED SC 1965) 237 F. Supp. 360, rev'd on other grounds.

We found no recent federal case, where a challenge to discriminatory jury selection procedures was held beyond the scope of federal jurisdiction.

The opinion of the Ninth Circuit Court of appeals presents a conflict with decisions in the Fifth, Eighth and Tenth and Fourth Circuits; this should warrant grant of certiorari to secure uniformity of decision.

IV

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH DOES NOT APPEAR TO HAVE BEEN EXPRESSLY SETTLED BY THIS COURT, IN A MANNER WHICH DEPARTS FROM THE USUAL COURSE OF JUSTICE SO AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION, AND WARRANTS AUTHORITATIVE SETTLEMENT OF THE QUESTION OF "IMMUNITY FROM SUIT" IN ACTIONS FOR DECLARATORY AND INJUNCTIVE RELIEF.

Without citation of authority, the majority below confers a blanket "immunity" on all but two of the respondents. This action seeks declaratory and injunctive relief, plus nominal damages.

The parties who became invested with "immunity" against declaratory and injunctive relief by the court below include the judges of the Superior Court. Such judges were sued only in their ministerial capacity as grand jury elisors, not in their judicial capacity. That judges are not 'immune' where they act in a non-judicial capacity of selecting juries is established by the imprisonment of Judge Cole which this Court ratified in Ex-parte Virginia, 100 US 339.

Early cases have recognized that the States have yielded their historic immunity from suit to the jurisdiction of the federal courts in all federal question cases, and cases enumerated in the Judicial Article III, §2 of the Constitution, by ratification thereof. *Chisholm v. Georgia* 2 Dall. (2 US) 419; *Cohens v. Vir-*

ginia 6 Wheat. (19 US) 264; *Ames v. Kansas* 111 US 449 (semble). Yet we find no recent case in this Court which would state in so many words whether there is —or is not—"immunity" from a declaratory judgment action or from a suit for an injunction.

The District Court and the separate opinion of Koelsch, C.J., would extend "governmental immunity" to the District Attorney and Attorney General, in direct conflict with this Court's decision in *Zwicker v. Koota*, 389 US 241. Clearly Kings County District Attorney Aron Koota is no more or less "immune" from suit than Evelle Younger, District Attorney of Los Angeles County.

This Court has settled in *Monroe v. Pape* 365 US 167, that state agents are not immune from a damage suit under 28 USC 1983. In the same case, the Court held that state governmental agencies are not suable natural "person" in suits for money damages. *Monroe* is silent as to any suit for equitable or declaratory relief, and does not decide whether the state can be sued under 28 U.S.C. §1981. It appears that in cases dealing with interpretation of state statutes, the State or its officers are necessary parties to the action. Where an injunction is sought or granted, this injunction must operate on some official.

Lower federal courts have not hesitated to enjoin state judges and officials in civil rights proceedings. E. g. *Phillips v. Cole* 298 F. Supp. 1049 (ND Miss 1968); *United States v. Clark* (SD Ala. 1965) 249 F. Supp. 720; *Bramlett v. Peterson* (MD Fla. 1969) 307

F. Supp. 1311. Declaratory and injunctive relief against states and their governmental bodies has been sanctioned by this Court. See. e. g. *D'Amico v. California* 389 US 416; *McNeese v. Board of Education* 373 US 668; (a suable entity); *Cipriano v. City of Houma* (1969) 23 L. Ed. 2d 647; *Carter v. Jury Commission of Greene County* (1970) 396 US 320.

Nevertheless, the issus of "governmental immunity" against equitable and declaratory relief in federal courts appears unresolved. Pragmatic dismissals of civil rights actions on asserted 'immunity' occur with increased frequency, although there are other cases contra in the same circuit. See e. g. *Southern Pacific Co. v. Conway* (9 Cir 1940) 115 F2d 746, 749 (Attorney General suable for declaration that statute is unconstitutional). Cf. the immunity from suit granted to Governor Reagan hereinbelow with the liability imposed upon his predecessor Edmund G. Brown in *Brown v. Brown* (9 Cir 1966) 368 F 2d 992, and the liability imposed upon the governor of Nevada in *Marshall v. Sawyer* (9 Cir 1964) 301 F 2d 639. Nor can we possibly reconcile the immunity from suit under 28 USC 1983 conferred by the courts below upon Governor Reagan of California with the fact that this court found no objection to a suit under the same statute against Governors Scranton of Pennsylvania or Johnson of Mississippi. *Houghton v. Scranton*, 392 US 639; *Cameron v. Johnson*, 390 US 611 (1968).

Nevertheless, defendants and the memorandum

opinion of the District Court cite authority from the 9th Circuit for an asserted "immunity" of anyone connected with state or local government. The Court of Appeals conferred such supposed immunity on most defendants hereinbelow, but left the issue unresolved as to others.

Authoritative resolution by this Court of claims of "official immunity" against constitutional attacks on state statutes and their enforcement, will clarify an important field of constitutional law, and will furnish guidance to federal judges in this district, who routinely dismiss civil-rights actions on grounds of "official immunity." This contributes to the conviction of a large segment of our population, that the lower courts' notion of "justice" means "just us."

V.

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF STATE LAW IN CONFLICT WITH APPLICABLE STATE LAW.

The District Court, relying on several recent decisions of the Ninth Circuit, conferred "immunity from suit" upon all defendants. The Court of Appeals affirmed as to some defendants, and did not rule on the claimed immunity of others. The Court of Appeals cited no authority for such 'immunity.'

Whether a person or body politic enjoys immunity from suit should be determined from applicable state law as substantive law. 28 U.S.C. 1652; *Erie v. Tompkins.*

Although California has historically adhered to the royal prerogative of immunity from suit, the Supreme Court of California has, at least since 1961, abrogated "the Rule of governmental immunity from tort liability . . . (which) must be discarded as mistaken and unjust." *Muskopf v. Corning Hosp. District* 55 C. 2d 211, 213, 11 C.R. 89, 90.

In 1963, California enacted comprehensive legislation, (*Government Code* §810 et seq), which provides statutory liability by state and local governmental entities and by officials and employees of such entities. The Legislature provided for commercial insurance not only for executive agencies of the state and its component parts (*Government Code* § 990), but also for all judges and court attaches acting "in the

scope of their employment." (*Government Code* §990.2).

The Supreme Court of California relied upon such insurance protection, and distinguished *Gregoire v. Biddle* (2 Cir 1949) 177 F 2d 579, and its justification of immunizing officials from suit:

> "The California system of (insurance) indemnification substantially eliminates the concerns of Judge Hand. The public employee need not suffer concern over the possibility that he will be compelled to finance and oversee a tort suit filed against him personally; the statute provides for defense by the public entity ..."

Johnson v. State of California (1968) 69 C 2d....., 69 A. C. 813, 821-824, 73 CR 240. State law also provides that cities and counties may sue and be sued in damages and for equitable and declaratory relief. E. g., Government Code 23004. 23005; *Hoyt v. Board of Civil Service Examiners;* 21 C2d 399, 132 P2d 804; *Shakespeare v. City of Pasadena* 230 CA 2d 372, 40 C. R. 863 (1966).

The issue whether a state and its agencies and officials are suable or immune from suit is to be decided by state law. The federal courts are bound by the law of the forum. 28 U.S.C. 1652.

The decisions below are in a diametric conflict with applicable state law, as embodied in statutes and the

decisions of the state courts. Certiorari should be granted to review the judgments below and align the Court below with the mainstream of judicial decision.

VI

THE DECISION BELOW RAISES SIGNIFICANT AND RECURING PROBLEMS VITAL TO THE PROPER ADMINISTRATION OF JUSTICE RESOLUTION OF SUCH QUESTIONS HAS IMMEDIATE IMPORTANCE FAR BEYOND THE PARTICLAR FACTS AND PARTIES INVOLVED.

We have shown the vital importance to the administration of civil as well as criminal law, of a rair and impartial jury selection procedure. We can conceive of no legitimate stake that any citizen could have in the perpetuation of aligarchic. unrepresentative juries. A combination of ancient prejudices, special privileges for rural legislators and voters, judicial inertia, and fear to tamper with governmental "immunities," have resulted in unrepresentative juries that should not survive a constitutional challenge based on Magna Carta (1215).

In the days of Blackstone, the courts of England realized that an all-English jury would be invariably prejudiced against foreign-born litigants. and established juries "de medietate lingua," composed of Englishmen and foreign-born in equal parts. III *Blackst. Comm.* 362, 363; IV *Blackst. Comm.* 349, 352. Our Declaration of Independence complained in 1776 that "He has obstructed the administration of justice" and "He has combined with others ... for depriving us.... of the benefits of trial by jury."

Yet in 1970, the U.S. Commission on Civil Rights finds that citizens of Hispanic descent are still "substantially underrepresented on grand and petit juries." (CRC report, p. iii).

The administration of justice in California has broken down completely. A large segment of the population, Negroes, "Chicanos," Indians, foreign-born, those on the sunny side of the generation gap, workers, employed persons, intellectuals, teachers---all those not in the higher echelons of the military-industrial complex--entertain a firm belief that California's courts are unable or unwilling to dispense justice. "We have our stamps all prepared" said Judge Cunningham at the Sentencing Institute for Superior Court Judges. West's *California Reporter,* Advance sheets, May 11, 1970, Appendix p. 78.

At the same Institute (ibid. pp. 76-77), the judges were warned: "The Administrator of the United States Courts said that this (habeas corpus) problem in California has reached monumental proportions—something like 9,000 of these things floating around the federal courts—and the judges have instructed him that this is a major problem that they have got to find a solution for."

Not 9,000 but 90,000 desperate Californians resent strongly being rubber-stamped into prison, and having their liberty hinge on "those things floating around federal courts," where virtually all civil rights actions are dismissed pragmatically also. Those who go out

and riot have given up all hope in democratic processes in this state. We urge this Court not to disappoint those citizens, like petitioners, who believe in and constructively work for the orderly and democratic administration of justice.

An essential first step is a jury system which fairly represents the conscience of the community. A second step is authoritative abrogation of medieval notions of governmental immunity. This corpse rears its head pragmatically, even though the Legislature and courts have pronounced the doctrine dead.

The vital importance to the administration of justice of the issues raised herein cannot be stated too emphatically.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

We respectfully suggest that this is a case for summary reversal upon grant of certiorari, with directions to convene a three-judge court (*Carter v. Jury Commission* 396 US 320; *Turner v. Fouche,* 396 US 346). to determine the constitutionality of the statutes; court rules and custom of the jury selection procedures challenged herein (*Zwickler v. Koota,* 389 US 241; *Carter v. Jury Commission,* supra). Upon a finding of discrimination in jury selection procedures, the appropriate state agents should be commanded to vacate the jury rolls, dissolve grand juries and juries which were selected unconstitutionally, and select new juries from a cross-section of the community. A prohibitory injunction should also issue to quash the challenged indictments if the Court determines that they were rendered by unconstitutionally convened grand juries.

If retrospective application is not given to the law of the case, there need be no fear of wholesale retrials of thousands of criminal and civil cases.

Respectfully submitted,

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Petitioner and Counsel for petitioner.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD D. ZELECHOWER, M.D. et al.,)
Plaintiffs-Appellants,)
vs.) No.
EVELLE J. YOUNGER, etc., et al.,) 23,331
Defendants-Appellees.)

[February 27, 1970]

Appeal from the United States District Court
for the Central District of California

Before: BARNES, KOELSCH and KILKENNY, Circuit Judges BARNES, Circuit Judge:

Appellants sought damages, declaratory and injunctive relief in the district court alleging the unconstitutionality of several California statutes governing grand jury selection and violation of the Civil Rights Act. (42 U.S.C. §§ 1981, 1983.) Preliminary injunctive relief was denied and the action was dismissed as presenting no substantial federal question. Plaintiffs brought this appeal under 28 U.S.C. § 1391 assigning numerous errors to the disposition below.

Appellants Peter D. and June Bogart were indicted in February, 1964, on charges of grand theft. Appellants Richard D. Zelechower, M.D. and Theodore and Susan Cohen were similarly indicted in September of 1966.[1]

The Bogarts were convicted on some of the charges[2] contained in their indictment on July 25, 1965. The Cohens and Zelechowers were similarly convicted on September 28, 1967. On October 5, 1967, appellants joined in this suit in an effort to restrain further prosecution under some of the counts of the 1964 and 1966 indictments that are still outstanding. They also sought other relief, which is described in greater detail, *post*.

Appellants' pleading requested several forms of relief. *First*, they sought injunctive relief against the giving of further force or effect to the 1964 and 1966 indictments in addition to a mandatory injunction ordering the dismissal of the remaining counts of those indictments (C.T. 11).

Second, they sought a declaratory judgment that Cal. Penal Code § 897, Cal. Code Civ. Proc. § 200 and Superior Court Rule 29, all of which govern the selection of Grand Jurors, "are repugnant to the Constitution of the United States. . . ." (C.T. 12)

Third, they sought nominal damages of one dollar, reserving " . . . the right to amend this item of their

[1]Some of the appellants were also charged with criminal conspiracy but it is not clear from the pleadings and affidavits at whom these charges were directed.

[2]It is not clear from the record which charges resulted in convictions

prayer, in the event they should decide to pray for full compensatory damages." (C.T. 11)

On February 2, 1968, the district court denied appellants' request for preliminary injunctive relief pending final determination of the merits of the case. (C.T. 58-61) On February 5, 1968, appellants' action was dismissed on the following grounds:[3] (1) that the Civil Rights Act does not create an exception to the long-standing rule[4] prohibiting federal injunctions against pending state criminal proceedings; (2) that decisions of the Supreme Court on the issue of jury selection clearly foreclosed the substantiality of appellants' action; (3) that the named defendants were not subject to damage suits under the Civil Rights Act.

Appellants, other than Peter D. and June Bogart, have abandoned their appeal; and so to them the appeal is dismissed.

Peter and June Bogart appear in pro per. As to their claims against defendants Evelle J. Younger, individually and as District Attorney of the County of Los Angeles; the Board of Supervisors of the County of Los Angeles; the Superior Court of the State of California for the County of Los Angeles, et al.; Thomas C. Lynch; "The People of the State of California, by Ronald Reagan, Governor of the State of

[3]Although the trial court dismissed the complaint for failure to state a claim upon which relief could be granted (Rule 12(b)(6) Fed R. Civ. Proc.), its action was in the nature of summary judgment on the merits since matters outside the pleading were considered (C.T. 65) See Rules 12 (d) and 56 (c) Fed. R. Civ. Proc.

California," we hold them improperly joined as defendants, and immune from suit.

As to Peter D. and June Bogart's claims against defendants Evelle J. Younger, individually and as District Attorney of the County of Los Angeles, and Thomas C. Lynch, individually and as Attorney General of the State of California, we will not pass on their claimed immunity, because of the following.

This appeal, now on behalf of Peter D. and June Bogart, presents two legal issues: Was the district court correct in denying preliminary and permanent injunctive relief? Was a substantial federal question presented by appellants' pleading? We hold these issues were correctly resolved against the appellants.

Preliminary Injunctive Relief Against Further Force and Effect of the Outstanding Indictments Was Correctly Denied

Appellants contend that the district court misread the case of *Douglas v. City of Jeannette,* 319 U.S. 157 (1943) (Appt. Br. 42) in denying their motion for a preliminary injunction. We disagree, particularly in view of the recent Supreme Court case of *Bokulich v. Jury Commission;* 394 U.S. 97 (1969). In *Bokulich* a three-judge district court found systematic exclusion of Negroes from the grand and petit juries of Greene County, Alabama. The trial court issued an injunction ordering the immediate compilation of a jury list on

a nondiscriminatory basis, but the panel refused to enjoin the criminal charges pending against the appellants that were about to be handed down by grand juries allegedly unconstitutionally chosen. The Supreme Court affirmed stating:

> "The District Court was warranted in assuming that the constitutional defects of which the appellants complained might be promptly remedied by compliance with its order that juries be reconstituted on a nondiscriminatory basis. If they were not, and if the appellants were in fact indicted, the appellants could raise any objection to the composition of the jury as a defense to their prosecutions. In these circumstances the court could properly conclude that this was not one of 'those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent.' *Douglas v. Jeannette*, [Citation omitted]." 394 U.S. at 98-9.

It is clear from this passage that the Supreme Court has foreclosed the possibility of injunctive relief against criminal prosecutions resulting from indictments handed down from unconstitutionally constituted grand juries. We reject as patently without merit appellants' contention, raised for the first time in their appellate brief (Appt. Br. 43), that this case has any First Amendment implications that would bring it within the rules enunciated in *Dombrowski v. Pfister*, 380 U.S. 479 and *Zwickler v. Koota*, 389 U.S. 241.

Appellants Did Not Present A Substantial Federal Question Requiring the Convocation of A Three-Judge Court

The district court found no substantial federal question presented by appellants' pleadings and affidavits and thus refused to convene a three-judge court under 28 U.S.C. § 2281. It found the exclusion of certain professionals to be based upon a recognized state interest of shielding certain professional occupations from the interference that would result from jury service. As such, the excluded class was not arbitrarily defined. This was found to be in line with the early holding of *Rawlins v. Georgia*, 201 U.S. 638, 640, in which Mr. Justice Holmes stated:

> "[T]he business of the persons omitted [is] such that either they would have been entitled to claim exemption or that probably they would have been excused."

Apellants contend that "Rawlins has been completely abandoned" (App. Op. Br. 18).[5] We can find no authority for this proposition, and *Hoyt v. Florida*, 368 U.S. 57 (1961) suggests the contrary.

In *Hoyt* the Supreme Court upheld a jury selection statute that excluded a much broader class of persons from jury duty than is excluded by the California statutes in issue. Mr. Justice Harlan, in finding the ex-

[5] We also reject appellants' contention that *Rawlins* was decided solely upon the grounds that the objectors to such jury discrimination were not members of the excluded professions." (Appt. Br. 30)

clusion of all women from jury duty was not necessarily unconstitutional, emphasized that the relevant inquiry in determining the constitutionality of jury selection statutes is the *rational nexus* between the population of the excluded class and the state interest to be advanced by the exclusion. Specifically, he said:

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the *exemption itself* is based on some *reasonable classification* and whether the manner in which it is exercisable *rests on some rational foundation.*" 368 U.S. at 57. (Emphasis added.)

Since we find the *Rawlins* and *Hoyt* cases dispositive of the constitutional question, we hold that appellants' complaint was correctly dismissed.

We do not reach the issue of immunity from damage suits under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, since we find no rights of the appellants have been violated.

AFFIRMED.

KOELSCH, Circuit Judge, CONCURRING SPECIALLY.

I do not share the court's view that the Zelechowers' pleading tenders no substantial federal question. As noted in the opinion, the attack centers upon Section 897 of the California Penal Code and a Local Rule (Rule 29) promulgated by the Superior Court of Los

Angeles County, California. Both the statute and the rule regulate the selection of persons for grand jury service. The statute operates to exclude from elgibility, persons "who are not exempt from serving . . . " Further statutes (Cal. P.C. 894 and CCP 200) specifically designate the persons so exempted. So far as pertinent to this case they are:

> "(1) A judicial, civil, naval or military officer of the United States or of this State, or a member of the Armed Forces of the United States while on active duty;
>
> * * *
>
> (3) An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;
>
> * * * * "

Local Rule 29 (although ambiguous) contains a broader exclusion than the statute and makes ineligible for grand jury service "(b) Spouses of judges and Commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice . . ."

The Zelechowers' theory, urged in their complaint, is that the quoted provisions appearing in both the statute and the rule contravene the Fourteenth Amendment to the Federal Constitution because the classifications are arbitrary. This court, on the supposed authority of *Rawlins v. Georgia,* 201 U.S. 638 (1906) and *Hoyt v. Florida,* 368 U.S. 57 (1961), holds these classifications reasonable and declares both statute and rule constitutionally valid.

I am not so sanguine. The *State statute* is probably not vulnerable to the attack for, as pointed out in *Rawlins*, an exclusion is valid if the work of the class is of such public importance that it should not be interrupted. The enumeration in the statute is of persons so engaged.

But I entertain grave doubts about the validity of the local rule. It creates and excludes a class consisting of "spouses" of those whose work warrants their being set apart and treated differently than others. However, it does not follow that because of their marital status the husbands and wives thus singled out are all engaged in some common activity or indeed any activity, much less one that would permit a like differentiation to be made of them.

Thus, unlike my brothers Barnes and Kilkenny, I would not so readily place a judicial imprimatur upon the local rule; neither would I reach the question of its validity. The Supreme Court has repeatedly declared that ordinarily it ought not to pass upon the constitutionality of a statute or rule unless adjudication is unavoidable and that the same principle should guide the lower courts as well. We should heed that admonition in this case.

I nevertheless concur in the result reached in the opinion. As there stated, injunctive relief should be withheld on principles of abstention. Declaratory relief can and should be denied on the same basis; and the action for damages against all defendants is nullified by the doctrine of immunity. The opinion holds

that several of the defendants are so protected, but expresses no opinion as to the defendants Younger and Lynch. The latter are, respectively, the District Attorney for Los Angeles County, California and Attorney General of that State. The complaint does not show and indeed could not be amended to show, their conduct on which the claims are purportedly based was not in the performance of their official duties.

I would affirm on that ground.

APPENDIX "B"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD D. ZELECHOWER, M.D.; THEODORE A. COHEN; SUSAN COHEN; PETER D. BOGART and JUNE BOGART, *Plaintiffs,*	)	
v.	)	
EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; The SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; THOMAS C. LYNCH, individually and as Attorney General of the State of California; the PEOPLE OF THE STATE OF CALIFORNIA, by RONALD REAGAN, Governor of the State of California, *Defendants.*	)	No. 67-1459-FW ORDER DISMISSING ACTION

In this action defendants have moved to dismisss the action of plaintiffs on the grounds that no claim for relief is stated in plaintiffs' complaint. Defendants Lynch and People of the State of California, by Ronald Reagan, Governor of the State of California, have

moved to dismiss on the additional grounds that the alleged federal questions are sham, frivolous and unsubstantial.

The plaintiffs' complaint discloses that plaintiffs seek an injunction enjoining defendants from giving force and effect to indictments of the Grand Jury of Los Angeles County returned against such said plaintiffs, and for a decree ordering defendants to dismiss such indictments now pending in the Superior Court of the State of California for the County of Los Angeles, and for a decree declaring that the methods of selection of jurors and grand jurors in the Superior Court of the State of California for the County of Los Angeles are void and of no legal effect because unconstitutional; and plaintiffs also pray for nominal damages of One Dollar ($1.00) with the right to amend to pray for full compensatory damages.

The indictment against plaintiffs Bogart is filed in criminal case No. 285313 in the records of the Superior Court of the State of California in and for the County of Los Angeles; it was returned by the Grand Jury on or about February 27, 1964. The indictment against the other plaintiffs is filed in criminal case No. 329469 in the records and files of said Superior Court; is was returned on or about September 26, 1966. The plaintiffs were charged with grand theft and some of them were also charged with criminal conspiracy. The capacities of the various defendants appear in the caption of this action, which is self-explanatory. Plaintiffs invoke jurisdiction of this Court un-

der Title 28, United States Code, Sections 1331 and 1443, and Title 42, United States Code, Sections 1981, 1983, and 2000B-2000B(3). In short, they base their claim of right on the Civil Rights Act.

While this court is aware of the rule that an action, as distinguished from a complaint, should not be dismissed on the grounds that there is a failure to state a claim upon which relief can be granted[6], this case is one in which the action can be dismissed under the rule enunciated in the case of *Sires v. Cole*, 320 F.2d 877, 879 (9th Cir. 1963), as well as in the case of *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965). Here it is clear that the plaintiffs are asserting a complaint for an injunction, declaratory relief and damages solely upon the grounds that their respective indictments are void because returned by grand juries which were selected in a manner unconstitutionally discriminatory to plaintiffs and that defendants in their respective official capacities are giving full force and effect to such indictments. The affidavits of plaintiffs Peter D. Bogart and Theodore A. Cohen filed in support of their motion for preliminary injunction, which motion has been denied by the Court, as well as the complaint and the file of the case, make clear that the plaintiffs are relying solely upon their claim of invalid Grand Jury indictments because of such unconstitutional discrimination against them in the selection of the Grand Juries returning the respective indict-

[6] *Conley v. Gibson*, 355 U.S. 41, 45-46 (5th Cir 1957); *Marshall v. Sawyer*, 301 F.2d 639, 647 (9th Cir. 1962); *Corsican Publications v. Pitchess*, 338 F.2d 441 (9th Cir. 1964); *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965).

ments. Their claim of unconstitutional discrimination in the selection of Grand Juries is based upon their claim that doctors and lawyers and their wives are excluded from Grand Jury service. Plaintiff Richard D. Zelechower is a doctor; plaintiff Theodore A. Cohen is a lawyer and plaintiff Susan Cohen is the latter's wife; plaintiff Peter D. Bogart is a lawyer and plaintiff June Bogart is the latter's wife.

Therefore, the mere granting of a motion to dismiss the complaint with leave to plaintiffs to amend would be an idle act; and any additional allegations concerning the discrimination against plaintiffs would be frivolous in view of the official capacities and the natures of the defendants herein so that the complaint is not subject to a corrective amendment. See *Sires v. Cole, supra,* at p. 879.

It will be hereinafter shown that each of the defendants is not subject to this suit under the Civil Rights Act but the Court will first discuss plaintiffs' claims as if at least some of the defendants were subject to such suit.

For the reasons hereinafter stated, injunctive relief should not be granted to plaintiffs.

Plaintiffs here rely on the Civil Rights Act in asserting their alleged right to an injunction. Such reliance in this case is without merit. The Civil Rights Act "should be construed so as to respect the proper balance between the states and the federal government

in law enforcement,' *Screws v. United States*, 325 U.S. 91, 108 . . . discretionary refusal to exercise equitable power under the Act to interfere with state criminal prosecution is one of the devices we have sanctioned for preserving this balance. *Douglas v. City of Jeanette*, 319 U.S. 15)." *Stefanelli v. Minard*, 342 U.S. 117, 121-122. Thus it is proper to withhold relief in equity even when recognizing that comparable facts would create a cause of action for damages. *Stefanelli v. Minard, supra*, at p. 122.

As stated in *Stefanelli v. Minard, supra*, at p. 122, ". . . courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarass threatened proceedings in state courts save in those exceptional instances which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." Citing *Douglas v. City of Jeanette, supra*, at p. 163.

The very complaint which plaintiffs make here, to wit, that they are entitled to an injunction because of unconstitutionality in the impaneling and selecting of grand juries was suggested by the Supreme Court in *Stefanelli v. Minard* at p. 123 of the official opinion as being one of the complaints that should not be honored with an injunction enjoining the state criminal proceeding.

The Court of Appeals for the Ninth Circuit set aside a District Court injunction enjoining prosecution

under an indictment returned by a Grand Jury where the District Court had ruled that the indictment should be set aside for two grounds, one of which was that the indictment had been returned by a Grand Jury not drawn from a fair cross-section of the population. *Ackerman v. International Longshoremen's & Warehouseman's Union*, 187 F. 2d 860 (9th Cir. 1951), reversing *International Longshoremen's & Warehousemen's Union v. Ackerman*, 82 F. Supp. 65. (The District Court's position in the last cited case concerning the invalidity of the indictment because of the Grand Jury question is set forth at p. 122 of the District Court decision.)

Plaintiffs rely on the ruling in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), where the Supreme Court found justification for an injunction restraining state officials from prosecuting or threating to prosecute plaintiffs. That case is clearly distinguishable from the case at bar: there the injunction was sought prior to the commencement of the prosecution and there was an interference by the state with freedom of expression and other First Amendment freedoms. Footnote 2 at p. 484 of the *Dombrowski* opinion makes clear that the decision therein made is bottomed on the fact, inter alia, that the state prosecution there involved had not been instituted at the time that appellants had sought injunctive relief in the U.S. District Court. In the case at bar the prosecutions sought to be enjoined have been pending for a long time; in fact, the prosecution against plaintiffs Bogart has been

pending for so long that plaintiffs Bogart would in any event seem to be barred by laches were it not for the fact that their application for injunction should be in any event denied for the reasons hereinbefore and hereinafter stated.

The plaintiffs have shown no extraordinary circumstances or irreparable injury which justifies this Court in granting an injunction. There is an ample opportunity to plaintiffs for ultimate review of federal questions. Here the claimed invalidity in the California Grand Jury system arising because of the exclusion of doctors, lawyers, and their respective wives from the Grand Jury panel does not present such manifest injustice, nor does it constitute the basic denial of due process, within the meaning of the rules which would permit interference with state criminal proceedings. The exemption of lawyers and doctors from jury service is of old stading and not uncommon in the United States. *Rawlins v. Georgia,* 201 U.S. 638, 640. A reasonable classification of exemptions from jury service will be upheld. *Hoyt v. Florida.* 368 U.S. 57 (1961).

For the same reasons as apply to the denial of injunctive relief, this court should not assume jurisdiction and proceed to determine whether or not the Grand Jury indictments involved are valid: nor should it proceed to determine the rights of the parties in the premises: nor should it proceed to make a determination as to the constitutional validity of the methods of selecting Grand Juries in the State of California. See *Brillhart v. Excess Insurance Co.,* 316 U.S. 491.

The balance of plaintiff's claim is based upon a claim for damages because of the actions of defendants in proceeding upon or threatening to proceed upon the alleged invalid indictments. However, at the present time they pray only for nominal damages of One Dollar ($1.00). While they seek the right to amend their prayer for larger damages in the event that the facts should justify, such an amended prayer would be frivolous. Damages being claimed to be less than the sum of $10,000.00, there is no federal jurisdiction to entertain the controversy herein insofar as damages only are concerned. 28 U.S.C. 1331(a). There must be a substantial federal question and here it is clearly apparent that there is none.

The Court now considers the dismissal of the action as to each of the defendants because of the fact that none of them is subject to suit under the Civil Rights Act.

The action must be dismissed as to the Superior Court of the State of California for the County of Los Angeles for the reason that judges are immune from civil liability for acts done in the course of their official functions and this doctrine is operative in actions grounded upon the Civil Rights Act. *Haldane v. Chagnon, supra,* at p. 603, citing authorities; *Serrano v. People of the State of California, et al.,* 361 F. 2d 474 (9th Cir. 1966).

The action must be dismissed also as to defendant People of the State of California, by Ronald Reagan, Governor of the State of California: People of the

State of California are immune from suit under the Civil Rights Act. *Serrano v. People of the State of California, et al., supra.*

Likewise the action must be dismissed as to defendant the Board of Supervisiors of the County of Los Angeles. Action under the Civil Rights Act must be against individual persons or officials; and the Board of Supervisors of Los Angeles County is not a suable legal entity. *Handy Cafe v. Justices of the Supreme Court, et al,* 248 F.2d 485, 487 (1st Cir. 1957). If it is plaintiffs' intention to sue the County of Los Angeles by suing the Board of Supervisors thereof, nevertheless the action still must be dismissed inasmuch as a county is immune from suit under the Civil Rights Act. *Monroe v. Pape* 365 U.S. 167, 187; *Sires v. Cole,* 320 F.2d 877, 879 (9th Cir. 1963).

Too, the action must be dismissed as to the individual defendants, to wit, Evelle J. Younger, individually and as District Attorney of the County of Los Angeles, and Thomas C. Lynch, individually and as Attorney General of the State of California. It affirmatively appears from the face of the plaintiffs' pleadings and from the whole record, in the case that plaintiff's action against these two individuals is actually against them in their official capacity. In paragraph 4 of plaintiff's complaint it is alleged that defendant Younger is charged with prosecution of indictable offenses within the County of Los Angeles and that defendant Lynch as Attorney General of the State of California is charged with the duty of enfore-

ing the statutes of and acting as counsel for the People of the State of California. It affirmatively appears from the complaint and from the whole record that plaintiffs are suing these two individual defendants based upon their intention to proceed with the prosecution of plaintiffs respectively under the indictments heretofore mentioned. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages, including an action under the Civil Rights Act, as that which protects a judge. *Barr v. Matteo*, 360 U.S. 564, 569; *Sires v. Cole*, *supra*, at p. 80. Such immunity extends to both Younger and Lynch where it is clear as here that these defendants are acting only in the performance of their traditional official functions. See *Robichaud v. Ronan*, 351 S.2d 533, 535.

Therefore, where as here none of the defendants is suable under the Civil Rights Act for damages and where as here injunctive relief should not be granted; and where as here this Court should not exercise jurisdiction to make a declaration as to the rights of the parties under the indictments mentioned or as to the validity of the indictments, it is appropriate to dismiss the action, it being determinable affirmatively from the complaint and from the entire record that plaintiffs are not entitled to any relief. Accordingly,

IT IS ORDERED that the within action is now dismissed.

DATED this 5th day of February 1968.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

REME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 14 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term 1970

No. 400

RICHARD D. ZELECHOWER, M.D.; THEODORE A. COHEN; SUSAN COHEN; PETER D. BOGART AND JUNE BOGART,

Plaintiffs-Appellants,

vs.

EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; the SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, et al; THOMAS C. LYNCH, individually and as Attorney General of the State of California; THE PEOPLE OF THE STATE OF CALIFORNIA, by RONALD REAGAN, Governor of the State of California,

Defendants-Appellees.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE

Supreme Court of the United States

October Term 1970

No.....

RICHARD D. ZELECHOWER, M.D.; THEODORE A. COHEN; SUSAN COHEN; PETER D. BOGART AND JUNE BOGART,

Plaintiffs-Appellants,

vs.

EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; the SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, et al; THOMAS C. LYNCH, individually and as Attorney General of the State of California; THE PEOPLE OF THE STATE OF CALIFORNIA, by RONALD REAGAN, Governor of the State of California,

Defendants-Appellees.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for Respondents EVELLE J. YOUNGER; THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and the SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court is set forth in Appendix "B" of the Petition. The opinion of the Court of Appeals for the Ninth Circuit and the concurring opinion are set forth in Appendix "A" of the petition. The order modifying the original opinion of the Court of Appeals is set forth in Appendix "A" of this Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, absent First Amendment circumstances, the Federal District Court should assume Equitable Jurisdiction for the purpose of granting declaratory and injunctive relief in an ongoing state criminal proceeding.

2. Whether defendants Board of Supervisors of the County of Los Angeles, the Superior Court of the State of California for the County of Los Angeles, and Evelle J. Younger as District Attorney of the County of Los Angeles are immune from suit for damages under 42 U.S.C. 1983.

3. Whether there is a reasonable nexus between the exclusion of certain professionals (including attorneys) from jury service and the recognized state in-

terest of shielding certain professional groups from interference that would result from such service?

STATUTES INVOLVED

The Los Angeles Superior Court Rule 29 [Grand Jury] Section 2. Nomination by Judges, each November has been amended to delete the following provision:

> "(b) Spouses of judges and Commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice shall not be nominated for grand jury service."

STATEMENT OF THE CASE

This action arises out of a complaint for a preliminary injunction, declaratory relief and monetary damages filed by petitioners on October 5, 1967, in the Federal District Court for the Central District of California. Petitioners Peter D. Bogart and June Bogart were indicted for grand theft on February 27, 1963. They were subsequently tried and convicted of several counts in their indictment on July 22, 1965. It is these indictments which the Bogarts seek to have enjoined and declared unconstitutional.

As no evidence was taken in the District Court, the case was disposed of on the basis of pleading and affidavits thereto. Petitioners alleged in their complaint that the California State Grand Jury Statutes

and Rule 29 of the Los Angeles Superior Court excluding physicians, lawyers and their wives from grand jury venires were in violation of equal protection and due process and that the separate grand jury indictments charging appellants were void. They also alleged that said pending criminal proceedings were causing irreparable injury to professional standing, reputation and earning power. Their allegations went on to state that the remedy at law was inadequate because to proceed through California appellate tribunals would cause delay, multiplicity and inconvenience. Petitioners asked the district court to enjoin respondents from giving any force or effect to the indictments, to dismiss the indictments and for a decree stating that the method of selecting grand jurors is unconstitutional as applied to petitioners.

Petitioner Peter Bogart alleged in his affidavit that he had been prosecuted for four and three quarter years by the Los Angeles County District Attorney for offenses of which he was not guilty. It was further alleged that the district attorney proceeded by way of grand jury indictment realizing that no honest judge would hear any more of his opinions and complaints. Petitioner also alleged that his license to practice law in the State of California would be suspended upon his conviction and that he could not recover the fees he would lose thereby.

Appellants also filed an affidavit of J. J. Daniels which alleged that Los Angeles County Grand Juries

are composed of older, white, conservative Anglo-Saxon upper income individuals. On February 5, 1968, the Honorable Frances C. Whelan granted respondents motion to dismiss.

On December 2, 1969, petitioners were heard in the United States Court of Appeals for the Ninth Circuit. Inasmuch as Richard Zeichhower, M.D., Theodore Cohen and Susan Cohen abandoned their appeal and as to them the appeal was dismissed. It is from the United States Court of Appeals affirming the District Court's dismissal that this writ is sought.

REASONS FOR DENYING THE WRIT

I

IT IS CONSISTANT WITH THE DECISIONS OF THIS COURT THAT A THREE JUDGE DISTRICT COURT NOT BE CONVENED ABSENT A PRELIMINARY DETERMINATION THAT PETITIONERS COMPLAINT CONTAINS A SUBSTANTIAL FEDERAL QUESTION.

Petitioners' request for an injunction did not merit the convening of a three judge court pursuant to Sections 2281 and 2284 of 28 U.S.C. and the court properly dismissed the complaint. In *California Water Service v. Redding*, 304 U.S. 252, 58 S. Ct. 865, 82 L. Ed. 1323 (1937), the court clearly pointed out that it was the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of com-

plaint to ascertain whether a substantial federal question is presented, as otherwise the provisions for convening a three judge court are not applicable.

Petitioners failed to raise a substantial federal question as the exemption of lawyers and physicians from jury duty is a reasonable classification. *Rawlins v. Georgia*, 201 U.S. 638, 50 L. Ed. 899 (1906). A reasonable classification of exemptions from jury service will be upheld. *Hoyt v. Florida*, 368 U.S. 57, 7 L. Ed. 2d 118 (1961).

II

THE COURT BELOW IN REFUSING TO INTERVENE IN OUTGOING STATE CRIMINAL PROCEEDINGS ACTED CONSISTENTLY WITH DECISIONAL LAW OF THIS COURT.

Petitioners are currently appealing convictions of grand larceny in the California Appellate Courts. At the time that the complaint was lodged the State criminal process had begun. Where a state criminal process has begun the court has held that federal courts of equity in the exercise of their discretionary power should refuse to interfere with or embarrass proceedings in state courts except in exceptional circumstances. *Douglas v. City of Jeanette*, 319 U.S. 157 (1942); *Stefanelli v. Minard*, 342 U.S. 117 (1951).

Unless first amendment freedoms of expression are threatened or irreparable injury results, ongoing state

criminal proceedings should not be stayed. The recent case of *Bokulich v. Greene*, 394 U.S. 97, 22 L. Ed. 2d 109, 89 S.Ct. 767 (1969) demonstrates that even where the improper constitution of a grand jury is shown the court will not enjoin the issuance of the indictment inasmuch as the appellant could raise any objection to the composition of the jury as a defense. In *Wilson v. Schnettler*, 365 U.S. 381, 81 S. Ct. 632, 56 L. Ed. 2d 620, this court held that when a state courts jurisdiction has first attached and the criminal defendant has a plain and adequate remedy at law relief in Federal District Court is unavailable.

Nor do petitioners fall within the narrow exception carved out of this rule by *Dombrowski v. Pfister*, 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965) and *Zwickler v. Koota*, 389 U.S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 610 (1967) which allows federal courts to avoid the abstention doctrine where statutes are attacked on their face as abridging free expression. Petitioners herein are not alleging abridgment of first amendment freedoms.

III

PETITIONERS CITATIONS DO NOT DEMONSTRATE THAT THERE IS ANY CONFLICT BETWEEN THE DECISION RENDERED BY THE COURT BELOW AND DECISIONS BY OTHER CIRCUITS ON THE SAME MATTER.

All of the decisions cited by petitioner save one concern themselves with writs of habeas corpus wherein each petitioner has exhausted his state remedies[1] or these remedies were no longer available to him[2].

The only decision which does not fall within this category is *White v. Crook*, 251 F. Supp. 401, which did not involve an ongoing state criminal proceeding such as the case at bar but in fact was a civil class action by residents of Lowndes County Alabama, seeking injunctive relief to remedy systematic exclusion of negroes from juries.

None of the cases cited by petitioner address themselves to the situation where federal equity jurisdiction is sought to enjoin are ongoing state criminal proceeding.

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[1] *Seals v. Wyman*, 304 F. 2d 53,
Scott v. Walker, 358 F. 2d 561 (1966),
Davis v. Davis, 361 F. 2d 770,
Brooks v. Beto, 366 F. 2d 1 (1966),
Henslee v. Stewart, 311 F. 2d 691 (1963),
United States Ex. Rel. Goldsby v. Harpole, 249 F. 2d 417,
State of Louisiana v. Newton, 343 F. 2d 161 (1965),
Woods v. Munn, 347 F. 2d 948 (1965),
Harris v. North Carolina, 240 F. Supp. 985 (1965).
Note: *Mitchel v. Henslee* cited at 322 F. 2d 16 could not be found in the volume cited by petitioner.

[2] *Labat v. Bennett*, 365 F. 2d 698 (1966).

Consequently, it must be assumed that Federal District Courts are consistant in following *Douglas v. City of Jeannette*, 319 U.S. 157, 87 L. Ed. 1324, 63 S. Ct. 887 (1943), in disallowing federal equitable relief to interfere with ongoing state criminal prosecutions.

IV

THE ISSUE OF IMMUNITY FROM SUIT IN ACTIONS FOR DECLARATORY AND INJUNCTIVE RELIEF HAS BEEN EXPRESSLY SETTLED BY THIS COURT AND CONSISTENTLY APPLIED BY THE FEDERAL COURT SYSTEM.

Petitioners have named the Board of Supervisors in the apparent attempt to include the County of Los Angeles. 42 U.S.C. 1983 expressly provides that only individual "persons" who are shown to have violated the civil rights of another may properly be named as defendants. This has been interpreted to exclude municipalities including counties or their governing boards. *Monroe v. Pape* (1961) 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492. *Dodd v. Spokane County, Washington* (9th Cir. 1968) 393 F. 2d 330. *Nieto v. Cole* (9th Cir. 1963) 320 F. 2d 817. See also *Monell v. City of Aurora* (1961) 365 U.S. 514, 81 S. Ct. 681, 5 L. Ed. 2d 741. *Agnew v. City of Compton* (9th Cir. 1959) 239 F. 2d 226. Cert. denied 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. 2d 910.

Similarly, the Superior Court of the State of California for the County of Los Angeles is not consid-

ered a "person" under 42 U.S.C. 1983. *Handy Cafe, Inc. v. Justices of the Superior Court* (1st Cir. 1957) 248 F. 2d 485; *Serrano v. California*, (9th Cir 1966) 361 F. 2d 474; *Haldon v. Chagnon* (9th Cir. 1965) 345 F. 2d 601.

While it is conceded that District Attorney Evelle J. Younger might be considered a "person" within the meaning of 42 U.S.C. §1983, he is nevertheless immune from this suit in so far as monetary damages are concerned. He is a quasi-judicial officer, vested with the same immunities as are judges, for acts performed within the scope of his duties as district attorney.

Gregoire v. Biddle (2nd Cir. 1949) 177 F. 2d 579. *Robichaud v. Ronan* (9th Cir. 1965) 351 F. 2d 533; *Bowers v. Heisel* (3rd Cir. 1966) 361 F. 2d 581.

The decisive majority of lower federal court decisions therefore confirms that there is little or no ambiguity in the law governing official immunity under the Civil Rights Act. While judicial and quasi-judicial officers enjoy immunity from civil damage suits, the doctrine does not extend to suits that seek equitable relief.

Petitioners additionally assert that this court has not authoritatively ruled on the issue of official immunity. The cases of *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 and *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288, would suggest the contrary. In *Koota* the Supreme Court held

that a district attorney was not immune to an action seeking declaratory and injunctive relief. Federal Courts should not hesitate to grant equitable relief against public officials when the facts of a case so merit. In *Pierson* the court held a judge to be immune from a civil damage action brought against him under the Civil Rights Act. Thus, since the court has affirmatively ruled on the issue of official immunity, further consideration of the issue at this time would be of no practical value.

The cases of *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, and *Zwickler v. Koota* (supra) cited by petitioners in their brief are clearly not controlling in the case at hand. *Monroe* is cited as authority for the proposition that state agents are not immune from a civil damage suit under the Civil Rights Act. In that case Chicago police officers were held civilly liable for unlawfully breaking into plaintiff's home and arresting him. The holding is consistent with the immunity doctrine in that no public official is ever entitled to immunity for acts performed outside the scope of his authority. In the case at bar, both the district court and the court of appeals affirmed that the conduct of respondents on which petitioners base their claim was in the performance of their official duties. *Monroe* is further distinguishable from the present case in that the immunity afforded police officers is more narrow in scope than the immunity enjoyed by judicial and quasi-judicial officers. *Norton v. McShane* (5th Cir. 1964) 332 F. 2d 855.

Petitioner's reliance on *Koota* is likewise misplaced. In their brief petitioners argue that since District Attorney Aaron Koota was not "immune" from suit, Evelle Younger should likewise enjoy no immunity in the present case. This alleged conflict can be easily resolved by noting the factual differences of the two cases. In *Koota* the suit filed against the district attorney sought only declaratory and injunctive relief. Civil damages were not requested. The court is therefore correct in its holding that his official immunity did not shield him against this suit in equity. In the instant case petitioners seek both equitable relief and damages at law. Based upon these facts, the lower court opinion is consistent with *Koota*. The only immunity granted Evelle Younger by the district court was against civil damages. He was never exempted from the equitable jurisdiction of the court. Therefore, insofar as this action pertains to equitable relief, Evelle Younger is no more or less immune from suit than was Aaron Koota.

In conclusion, it is quite obvious that the lower courts were correct in their holding that all of the respondents mentioned herein were either improperly joined as defendants or immune from civil damages pursuant to the Civil Rights Act. Likewise, since it has been clearly demonstrated that petitioners are not entitled to equitable relief, the court were justified in dismissing the complaint.

V

THE COURT OF APPEALS DID NOT INCORRECTLY DECIDE A QUESTION OF SUBSTANTIVE STATE LAW.

A. THE COURT OF APPEALS DECIDED NO QUESTIONS OF STATE LAW.

The petitioners, by their allegation that the Court of Appeals incorrectly decided a question of applicable state law, have apparently misinterpreted the court's opinion. A reading of the opinion reveals that the court did not address itself to any issues of state law. No reference was made to any California statutes or judicial decisions. The court limited itself to a discussion of the issues raised on the District Court level. Thus the only affirmative action taken by the court of appeals was in affirming the lower courts' decision by holding that petitioner's complaint had been correctly dismissed.

B. THE ISSUE OF APPLICABLE STATE LAW HAS BEEN IMPROPERLY RAISED AND SHOULD NOT BE CONSIDERED BY THIS COURT.

Both the Supreme Court and lower appellate courts have consistently adhered to the rule that they will consider only those questions which were raised in the lower court. *Ellis v. Dixon* (1955) 349 U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231; *McGrath v. Manufacturing Tr. Co.*, 338 U.S. 241, 94 L. Ed. 31; *Dann v. United States*, 248 U.S. 390, 76 L. Ed. 356. Neither in their original

complaint nor in their subsequent appellate brief did petitioners allege that state law should be applied in considering the question of immunity from suit. As evidenced by their earlier pleadings, petitioners at all times considered federal law to be controlling in this area. In their petition for certiorari, however, they assert that whether a state and its agencies and officials are suable or immune from suit is to be decided by state law. Clearly the court should not entertain this completely new theory of liability which petitioners have attempted to inject into the lawsuit at this late stage of the proceedings.

C. THE APPLICATION OF STATE LAW TO THE QUESTION OF OFFICIAL IMMUNITY WOULD RENDER THE RESPONDENTS IMMUNE TO A SUIT FOR CIVIL DAMAGES.

Assuming arguendo that petitioners are correct in assuming that substantative state law governs in the area of immunity from suit, respondents are nevertheless exempt from this action to the extent that civil damages are involved.

Likewise, according to both the doctrine established by *Erie v. Tompkins* (1938) 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and 28 U.S.C. §1652, all federal courts situated in California must apply the substantive law of the state in ruling on questions of immunity from suit under the Civil Rights Act. Since all actions grounded on the Civil Rights Act necessarily raise a

federal question and invoke federal court jurisdiction. California state courts never squarely face the issue of immunity in its application to the Act. One is therefore forced to turn to the decisions of federal courts located within California for the only expression of substantive state law on the subject. The decisions of these courts affirm respondents contention that they may successfully invoke the doctrine of immunity.

Federal Courts applying California law have held that the County of Los Angeles and the Superior Court of the State of California are not suable entitees. *Diamond v. Pitchess* (9th Cir. 1969) 411 F. 2d 565. *Pinkus v. Arenberg* (D.C. Calif. 1966) 258 F. Supp. 996; *Shackman v. Arenberg* (D.C. Cal. 1966) 258 F. Supp. 983. *Arnold v. Buslick* (9th Cir. 1964) 339 F. 2d 879 (judicial immunity); *Friedman v. Younger* (D.C. Cal. 1968) 282 F. Supp. 710 (District Attorney).

To conclude, even assuming that petitioners may properly raise the issue of applicable state law at this late date, the foregoing argument shows that the interpretation of California law was not in issue and even if it had been Federal Courts sitting in California have interpreted it in a manner consistent with State substantive law.

VI

THE DECISION OF THE COURT OF APPEALS RAISES NO QUESTIONS OF IMMEDIATE IMPORTANCE THAT EXTEND BEYOND THE FACTS OF THIS PARTICULAR CASE.

The facts of this case clearly demonstrate that it raises no novel issues not heretofore considered by the Supreme Court. The denial of equitable relief by the Court of Appeals was consistent with the decisions of this court and offers a sound basis for the denial of the petition for certiorari. Indeed the Supreme Court has firmly established that a federal court of equity should not enjoin on going state criminal proceedings in the absence of a possible infringement on First Amendment rights or threatened irreparable harm. *Zwickler v. Koota*, (*supra*): *Wilson v. Schnettler*, (*supra*): *Douglas v. City of Jeanette*, (*supra*). Petitioners have not demonstrated that they fall within either exception. It is evident that they have an adequate remedy at their disposal in which to challenge the alleged unconstitutional grand jury indictments. All of petitioners' contentions may be fully aired by appealing their convictions in the state and federal appellate court systems. Petitioner's petition for certiorari is therefore nothing more than a substitute for appeal. A denial of the petition can be grounded on the maxim that federal courts have traditionally refused to exercise their equitable powers as a substitute for available appellate

procedures. *Morton v. Avery* (6th Cir. 1968) 393 F.2d 138; *Booker v. State of Arkansas* (8th Cir. 1968) 380 F. 2d 240. The policy behind this rule lies in the desire of federal courts to avoid deciding criminal appeals on a piecemeal basis.

The decision of the court of appeals was likewise not in discord with the rulings of other federal courts concerning the doctrine of official immunity from suit. Both this court and the clear majority of lower federal courts have consistently held that counties and courts of law are not suable entities within the meaning of the Civil Rights Act. *Monroe v. Pape, supra; Dodd v. Spokane County, Washington, supra; Sires v. Cole, supra; Handy Cafe, Inc. v. Justices of the Superior Court, supra; Pinkus v. Arenbergh, supra.* These same courts have additionally held that both judges and prosecuting attorneys are immune from civil damage suits based upon the above Act. *Pierson v. Ray, supra; Haldane v. Chagnow, supra; U.S. v. Clark, supra; Clark v. State of Washington.*

For the aforementioned reasons, respondents therefore respectfully request that the petition for certiorari be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Richard D. Zelechower, M.D., et al., Plaintiffs-Appellants, vs. Evelle J. Younger, etc., et al., Defendants-Appellees.	)))))	No. 23331

[February 27, 1970]

ORDER MODIFYING OPINION

Before: BARNES, KOELSCH and KILKENNY, Circuit Judges.

The opinion of January 28, 1970 in the above matter is modified by striking from the ninth paragraph thereof (beginning with the words "Peter and June Bogart") the following:

> "Evelle J. Younger, individually and as District Attorney of the County of Los Angeles"

and

> "Thomas C. Lynch, individually and as Attorney General of the State of California":

so that said ninth paragraph of said opinion shall read:

> "Peter and June Bogart appear in pro per. As to their claims against defendants the Board of Supervisors of the County of Los Angeles; the Superior Court of the State of California for the County of Los Angeles, et al.; 'The People of the

State of California, by Ronald Reagan, Governor of the State of California,' we hold them improperly joined as defendants, and immune from suit."

KOELSCH, Circuit Judge, CONCURRING SPECIALLY.

I do not share the court's view that the Zelechowers' pleading tenders no substantial federal question. As noted in the opinion, the attack centers upon Section 897 of the California Penal Code and a Local Rule (Rule 29) promulgated by the Superior Court of Los Angeles County, California. Both the statute and the rule regulate the selection of persons for grand jury service. The statute operates to exclude from eligibility persons "who are not exempt from serving . . . ." Further statutes (Cal. P.C. 894 and CCP 200) specifically designate the persons so exempted. So far as pertinent to this case they are:

> "(1) A judicial, civil, naval or military officer of the United States or of this State, or a member of the Armed Forces of the United States while on active duty;
> * * * "
>
> (3) An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;
> * * *

Local Rule 29 (although ambiguous) contains a broader exclusion than the statute and makes ineligible for grand jury service "(b) Spouses of judges and

Commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice . . . ".

The Zelechowers' theory, urged in their complaint, is that the quoted provisions appearing in both the statute and the rule contravene the Fourteenth Amendment to the Federal Constitution because the classifications are arbitrary. This court, on the supposed authority of *Rawlins v. Georgia*, 201 U.S. 638 (1906) and *Hoyt v. Florida*, 368 U.S. 57 (1961), holds these classifications reasonable and declares both statute and rule constitutionally valid.

I am not so sanguine. The *State statute* is probably not vulnerable to the attack for, as pointed out in *Rawlins*, an exclusion is valid if the work of the class is of such public importance that it should not be interrupted. The enumeration in the statute is of persons so engaged.

But I entertain grave doubts about the validity of the local rule. It creates and excludes a class consisting of "spouses" of those whose work warrants their being set apart and treated differently than others. However, it does not follow that because of their marital status the husbands and wives thus singled out are all engaged in some common activity or indeed any activity, much less one that would permit a like differentiation to be made of them.

Thus, unlike my brothers Barnes and Kilkenny, I would not so readily place a judicial imprimatur upon

the local rule; neither would I reach the question of its validity. The Supreme Court has repeatedly declared that ordinarily it ought not to pass upon the constitutionality of a statute or rule unless adjudication is unavoidable and that the same principle should guide the lower courts as well. We should heed that admonition in this case.

I nevertheless concur in the result reached in the opinion. As there stated, injunctive relief should be withheld on principles of abstention. Declaratory relief can and should be denied on the same basis; and the action for damages against all defendants is nullified by the doctrine of immunity. The opinion holds that several of the defendants are so protected, but expresses no opinion as to the defendants Younger and Lynch. The latter are, respectively, the District Attorney for Los Angeles County, California, and the Attorney General of that State. The complaint does not show, and indeed could not be amended to show, their conduct on which the claims are purportedly based was not in the performance of their official duties.

I would affirm on that ground.